No. 48294-1-II
consolidated with
No. 49554-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

CHRISTOPHER OLSEN

IN RE: PERSONAL RESTRAINT
OF CHRISTOPHER OLSEN

REPLY BRIEF OF APPELLANT

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A. Argument in Reply

For reasons that are unclear, the State chose to renumber Mr. Olsen's assignments of error. In this reply brief, Mr. Olsen retains his original numbering.

1. The newly corrected testimony of Bryant Ward would probably change the result of the trial.

Mr. Olsen's first contention in his PRP was that Bryant Ward's letter of November 9, 2015, as verified in his April 19, 2016 interview, constitutes newly discovered evidence and a new trial should be ordered. The State does not argue that the information was discovered until after the trial and could not have been discovered with due diligence. Its sole argument is that it would not change the result of the trial. BOR, 47, footnote 8.

The State argues Bryant's trial testimony was "consistent with that of the other surviving passenger in the same vehicle – Ricky Pederson." BOR, 48. In the next paragraph, the State contends, "Bryant's new version of events is not consistent with Pederson's testimony or that of the other witnesses who all described the defendant's vehicle as giving chase to Ward's." BOR, 48. The State's argument in these two sentences is disingenuous at best. First, there are and continue to be differences

between the testimony of Mr. Pederson and Byant Ward, but there are fewer differences with his post-conviction statement than his trial testimony. But more importantly, the State ignores the fact that Bryant's post-trial version provides powerful corroboration of Mr. Olsen's trial testimony.

At trial, the State heard from the three witnesses who observed Robert Ward's conduct in the vehicle: Mr. Pederson, Bryant Ward, and Mr. Olsen. Mr. Olsen testified on his own behalf at trial. He testified as they approached the traffic light at Canyon and 176th, he saw Robert Ward drive through the red light and maneuver like he was going to turn left. RP, 2086. Mr. Olsen turned right and for a moment he composed himself. RP, 2086. But when he looked up, he realized Robert Ward had not turned left, but had turned right instead, and was driving parallel to Olsen but on the other side of the road against traffic. RP, 2087. Mr. Olsen drove until traffic in front of him forced him to stop. RP, 1295-96. He saw Robert Ward lift up his gun and act as if he was going to shoot him. RP, 2088. Mr. Olsen fired three or four shots in response. RP, 2088. When asked why he fired his gun, Mr. Olsen answered, "I was afraid he was going to start shooting at me." RP, 2089. In order for the jury to find he acted in self-defense, the jury had to believe this last sentence.

Mr. Pederson did provide some minimal corroboration of Mr. Olsen's testimony on two key facts: what happened at the intersection of 176th and Canyon and whether Robert pointed a gun at Mr. Olsen. Mr. Pederson testified that as they approached the intersection, Pederson told Robert Ward to take a left, but Robert panicked and took a right into on-coming traffic. RP, 1158. In contrast, Bryant testified he did not see how or why Robert turned right rather than left, only that when he looked up they were traveling in the wrong direction. RP, 1112. Mr. Pederson testified he saw Robert Ward pull out his firearm from his waistband and lift it off his lap as they pulled into the intersection. RP, 1162, 1205. In contrast, Bryant testified he never saw Robert with a gun. RP, 1114. So while Mr. Pederson did provide some minimal corroboration of Mr. Olsen's testimony, it was undercut by Bryant's testimony.

In contrast, Bryant's post-conviction statement would have provided substantial corroboration of Mr. Olsen's trial testimony, making it substantially more believable. In describing the car chase, Bryant corroborated Mr. Olsen's testimony that Robert Ward turned right in order to chase him, "Olsen ended up being the one who was fleeing with 'G' chasing him. Not the other way around." More importantly, Bryant corroborated Mr. Olsen's testimony that Robert Ward lifted his gun as if

to shoot him, "[T]he last thing I saw was 'G' pointing his gun at the truck like as to shoot through the windshield."

On the whole, Mr. Olsen's testimony was much more likely to be believed by the jury had Bryant testified consistent with his post-conviction statement. The minimal corroboration provided by Mr. Pederson coupled with the substantial corroboration of Bryant would probably have changed the result of the trial.

2. The "clear break" in the action at the intersection of 176th and Canyon negated the need for a first aggressor instruction.

In his direct appeal, Mr. Olsen contended the trial court erred by giving the jury the first aggressor instruction of WPIC 16.04. He contended that, regardless of what happened at the Taco Time parking lot, there was a "clear break in the action." BOA, 25. The State takes issue with that, saying there was no "clear break." BOR, 20. The State argues that because the car chase took place "in a matter of minutes" after the confrontation at Taco Time. BOR, 20. The State also contends Mr. Olsen "took no action to desist from the car chase." BOR, 21.

The fact that the events at the Taco Time occurred only a few minutes before the car chase on Canyon does not negate the fact that there was a clear break in the action. Events can occur in close temporal

proximity and still be considered legally separate events. See *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999) (defendant who over the course of two minutes once penetrated victim's anus and twice her vagina was properly convicted of three counts of rape).

More importantly, Mr. Olsen took affirmative action to disengage from the car chase at the corner of 176th and Canyon. When Mr. Olsen saw the vehicle driven by Robert Ward drive through the red light and across three lanes of busy traffic in order to turn left, Mr. Olsen turned right. This should have had the effect of terminating the car chase. Instead, Robert Ward at the last moment changed his mind and turned right onto Canyon, driving into the on-coming traffic and trying to chase down Mr. Olsen. This constituted a clear break in the action and constitutes a good faith effort to "withdraw from the combat at such a time and in such a manner as to have clearly apprised his adversary that he in good faith was desisting, or intended to desist from further aggressive action." *State v. Dennison*, 115 Wn.2d 609, 617, 801 P.2d 193 (1990). The trial court erred by giving the first aggressor instruction.

3. The trial court erred by concluding Mr. Olsen lacked standing to object to the use of the Stingray.

In his direct appeal, Mr. Olsen objected to the use of Stingray technology by law enforcement. The State makes three rebuttals to this argument. First, it argues the record is insufficient to review because there is not a sufficient description of what a Stingray is. Second, Mr. Olsen presents no evidence the Stingray was used to apprehend him. And third, the trial court properly found he lacked standing.

Before reaching the merits of the State's argument, it is worth pointing out what is not at issue. In his Brief, Mr. Olsen argued that the use of Stingray technology constitutes a search under both the Fourth Amendment and article 1, section 7. As a search, it must be preauthorized by court order, and former RCW 9.73.260 did not authorize such a court order. The State makes no effort to rebut either of those contentions and it is uncontested no court order was obtained for Stingray use. Therefore, any use of the Stingray in this case was unlawful.

The State's first contention is that the record does not adequately describe the technology. The State further takes issue with Mr. Olsen's contention that Stingray technology "is a type of cell site simulator device." BOR, 24. While it is true there is not a detailed description of the Stingray, detailed description was unnecessary in this case. The State in

its trial brief conceded that Stingrays are "cell site simulator devices" and were used without a warrant or court order to locate Nathan Stevenson. CP, 284, lines 10-11 ("Even if the court finds that the warrantless use of the cell site simulator with respect to Mr. Stevenson constitutes government misconduct, that action has not prejudiced the Defendant.") The State makes no effort to refute the description of Stingrays contained in *In re Cell Tower Records*, 90 F Supp 3d 673, 674-75 (S.D. Tex. 2015) and the record is sufficient for review.

As to the State's second point, the State misapprehends Mr. Olsen's argument. Mr. Olsen concedes, based upon the record in this case, that there is no evidence a Stingray was used to locate Mr. Olsen. But the State conceded a warrantless search for Mr. Stevenson was done using a Stingray. The information gathered from that illegal search eventually led to Mr. Olsen's arrest. The issue is whether Mr. Olsen has standing to object to the illegal search for Mr. Stevenson's cell phone.

Which leads to the State's third argument and the one that the trial court hung its hat on: whether Mr. Olsen has standing to object. The question for this Court is, when police illegally use technology to invade the privacy of thousands, if not millions of people, in order to locate one person, do those people have standing to object to the search? The answer has to be yes.

In addressing the same statute in a different context, the Washington Supreme Court has ruled that evidence obtained in violation of chapter 9.73 RCW must be suppressed, regardless of whether the violation was committed against the defendant or someone else. The Court said, "Accordingly, we must conclude on the basis of the language and history of RCW 9.73, the legislature intended to allow a defendant to object to the use in his criminal trial of evidence obtained in violation of the statute, even though the defendant himself was not a participant in the unlawfully intercepted or recorded conversation." *State v. Williams*, 94 Wn.2d 531, 546, 617 P.2d 1012 (1980). Under this analysis, Mr. Olsen has standing to object to the use of the Stingray to locate Mr. Stevenson.

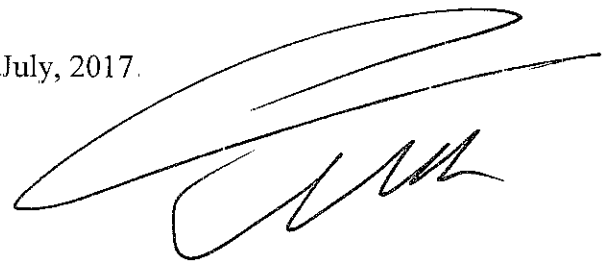
In his BOA, Mr. Olsen cited the case of *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994). The State tries unsuccessfully to distinguish *Young*. In *Young*, police used a thermal imaging device to analyze the suspect's home, but also used the device to analyze every home on the block. In *Young*, the person complaining of the illegal search was the suspect. But under the *Young* Court's analysis, it could just as easily have been the neighbor, whose privacy was invaded no less than that of the suspect. In this analogy, Mr. Olsen is the neighbor. When police invaded the privacy of thousands of cell phone users by illegally using the Stingray to look for Mr. Stevenson, they inevitably also invaded the privacy of Mr.

Olsen Mr. Olsen has standing to object to the use of the Stingray and his assignment of error should be sustained.

B. Conclusion

For all of these reasons, as well as the arguments presented in his original Brief of Appellant, this Court should reverse Mr. Olsen's conviction and order a new trial.

Dated this 14th day of July, 2017.



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